IN THE

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 229.

HENRY VAN REED,
Plaintiff in Error,

vs.

THE PEOPLE'S NATIONAL BANK
OF LEBANON, PENNSYLVANIA,

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

The judgment of the Court of Appeals affirmed an order of the Appellate Division of the Supreme Court of New York, in the First Department, which vacated an attachment granted against property of the defendant, a national bank. The errors assigned are the affirmance of that order and the declaration that the property of the defendant is exempt from attachment under Section 5242 of the United States Revised Statutes, notwithstanding Section 4 of the Act of Congress of July 12, 1882.

The plaintiff is the assignee of J. W. M. Newlin, a Philadelphia lawyer, who has an alleged claim for services against the defendant. The services were

rendered in Philadelphia, and the defendant has its place of business at Lebanon, Pennsylvania. The assignment was obviously made to a resident of New York in order to obtain an attachment and force a settlement, as no reason is given why suit was not brought in Pennsylvania, where the subject matter arose and where the parties reside (pp. 3 and 4).

The attachment was granted on the ground that the defendant is a foreign corporation, and the affidavits on which it was granted show that the defendant is a national bank, organized under the banking laws of the United States, and located and doing business at Lebanon, Pennsylvania (p. 2)

The defendant appeared specially and moved to vacate the attachment, specifying, as a ground, that the attachment was granted against a national bank, contrary to the statutes of the United States (p. 5).

The motion was denied, the learned Justice at Special Term handing down the following memorandum (p. 6):

"In opposition to my own judgment (see 124 U. "S. R., 721), and upon the authority of the cases "decided by the courts of our own State, the motion "to vacate the attachment will be denied, with $10 "costs (81 N. Y., 385; 93 *Id.*, 371). The question "ought to be settled by the Appellate Division."

The Appellate Division reversed the order made below and vacated the attachment (p. 7), Mr. Justice Laughlin writing the opinion of the Court (reported 67 App. Div. (N. Y.), 75).

An appeal from this order not being a matter of right, upon application of the plaintiff, the Appellate Division certified the following questions to the Court of Appeals (p. 8):

"1. Is the defendant exempt from attachment "before judgment under Section 5242, U. S. Revised "Statutes?"

" 2. Are the rights claimed by the plaintiff to at-
" tachment against the defendant before judgment,
" and to the jurisdiction thereby acquired, preserved
" and given by Section 4 of the Act of Congress of
" July 12, 1882? "

In affirming the order, the Court of Appeals answered the first question in the affirmative and the second in the negative (p. 14), Vann, *J.*, writing the opinion of the Court, in which all concurred (reported 173 N. Y., 314).

Thereafter, the plaintiff obtained a writ of error to this Court (pp. 26 and 27).

The defendant in error submits that under the statutes of the United States, as construed by this Court in *Pacific National Bank* vs. *Mixter* (*124 U. S., 721*), the judgment of the Court of Appeals was correct.

First.

The defendant in error, a national bank, is exempt from attachment before final judgment under Section 5242 of the United States Revised Statutes.

Section 5242 (Compiled Statutes, 1901, p. 3517) provides as follows:

" All transfers of the notes, bonds, bills of ex-
" change or other evidences of debt owing to any
" national banking association, or of deposits to its
" credit, all assignments of mortgages, sureties on
" real estate, or of judgments or decrees in its favor;
" all deposits of money, bullion or other valuable
" thing for its use or for the use of any of its
" shareholders or creditors; and all payments of
" money to either, made after the commission of
" an act of insolvency, or in contemplation thereof,
" made with a view to prevent the application of its
" assets in the manner prescribed by this chapter,
" or with a view to the preference of one creditor

" to another, except in payment of its circulating " notes, shall be utterly null and void; *and no at-* " *tachment, injunction or execution shall be issued* " *against such association or its property before* " *final judgment in any suit, action or proceeding* " *in any State, county or municipal court.*"

Section 52 of the National Currency Act of 1864 (*13 U. S. Stat. at Large, p. 115*) was as follows: " *And be it further enacted*, that all transfers of the " notes, bonds, bills of exchange, and other evidences " of debt owing to any association or of deposits to " its credit; all assignments of mortgages, sureties " on real estate or of judgments or decrees in its " favor; all deposits of money, bullion or other valu- " able thing for its use or for the use of any of its " shareholders or creditors; and all payments of " money to either, made after the commission of an " act of insolvency or in contemplation thereof, with " a view to prevent the application of its assets in " the manner prescribed by this act, or with a view " to the preference of one creditor to another, ex- " cept in payment of its circulating notes, shall be " utterly null and void."

Section 57 of the original act (*13 U. S. Stat. at Large, p. 116*), was as follows:

" *And be it further enacted*, That suits, actions " and proceedings against any association under " this act may be had in any circuit, district or ter- " ritorial court of the United States held within the " district in which such association may be estab- " lished, or in any state, county, or municipal " court in the county or city in which said associa- " tion is located, having jurisdiction in similar cases: " *Provided, however*, That all proceedings to enjoin " the Comptroller under this act shall be had in a " circuit, district, or territorial court of the United " States held in the district in which the association " is located."

In 1873, by the Act of Congress of March 3d of that year (*17 U. S. Stat. at Large, p. 603*), Section 57 was amended by the addition of the following clause:

"*And provided further*, that no attachment, in-
" junction or execution shall be issued against such
" association or its property before final judgment
" in any such suit, action, or proceeding in any State,
" county, or municipal court."

Then, in 1874, the Revised Statutes were enacted, in which Section 52 of the original act appears as Section 5242, with the addition of the foregoing clause added to Section 57 by the amendment of 1873 (except the word "such" before "suit, action," &c.), and in this form has remained to the present time, as quoted above.

The judicial construction of these statutes has been as follows:

In New York, the case of *Robinson* vs. *National Bank of Newberne, 81 N. Y., 385*, decided in 1880, held that an attachment could issue from the courts of that State against the property of a national bank located in another State. In that case the bank was solvent.

In *Raynor* vs. *Pacific Nat. Bank, 93 N. Y., 371*, decided in 1883, it was held that attachments against an insolvent national bank were prohibited.

As the law then stood in New York, an attachment could issue against the property of a solvent national bank, but not against one that was insolvent, and it was in accordance with this state of the law that the attachment in the case of *Bank of Montreal* vs. *Fidelity National Bank*, referred to below, was sustained by the Special Term in 1887.

In 1888, the Supreme Court of the United States construed Section 5242 in the case of *Pacific National Bank* vs. *Mixter, 124 U. S., 721*. This bank, situated in Boston, became embarrassed in November,

1881, and was placed in charge of a Bank Examiner until March, 1882. From the report of this case below (22 Fed. Rep., 694) it appears that when the bank resumed business in March it had an apparent surplus of nearly a million dollars, and the directors, the Bank Examiner and the Comptroller of the Currency all believed it to be solvent. Certain creditors began suits by attachment within a few days after the bank opened, and while it was doing business in the regular way. [The date "1881," in 124 U. S , at p. 722, seems to be a typographical error for "1882."] The bank gave bonds to discharge the attachments and continued to do business until May 20, 1882, a period of two months, during which time it received over $2,000,000 in deposits and paid all claims as presented, only failing when new difficulties arose. The Receiver, appointed in May, moved to set aside the attachments and for certain other relief. The attachments were upheld in the Circuit Court, because the bank was solvent when they were issued. Upon appeal to the Supreme Court of the United States, Chief Justice Waite delivered an opinion in which he said in part:

"In the view we take of the case, the most im-
" portant question to be considered is whether an
" attachment can issue against a national bank be-
" fore judgment, in a suit begun in the Circuit
" Court of the United States." After quoting the above provision from Section 5242 of the United States Revised Statutes, and tracing the growth of the entire section, he said: "It is clear to our minds that,
" as it stood originally as part of Section 57, after
" 1873, and as it stands now in the Revised Statutes,
" it operates as a prohibition upon all attachments
" against national banks under the authority of the
" state courts. * * * It stands now, as it did
" originally, as the paramount law of the land, that
" attachments shall not issue from state courts
" against national banks, and writes into all state

"attachment laws an exception in favor of national "banks. Since the Act of 1873, all the attachment "laws of the State must be read as if they con- "tained a provision in express terms that they "were not to apply to suits against a national "bank." He then said that the same rule applied to United States courts, which can issue attachments only in accordance with the provisions of State laws. "The law in this respect stands precisely as it would "if there were no State law providing for such a "remedy in any case. * * * In our opinion the "effect of the Act of Congress is to deny the state "remedy altogether, so far as suits against national "banks are concerned, and in this way it operates "as well on the courts of the United States as on "those of the States. Although the provision was "evidently made to secure equality among the "general creditors in the division of the proceeds "of the property of an insolvent bank, its opera- "tion is by no means confined to cases of actual or "contemplated insolvency. The remedy is taken "away altogether and cannot be used under any "circumstances."

The plaintiff in error seeks to show that this language is *obiter* and claims that the judgment in that case sustained the attachments as a means of acquiring jurisdiction, although vacating their lien on the property attached. But in that case the defendant bank was not non-resident, as stated in the brief for the plaintiff in error on page 12, and from the Massachusetts statutes cited on page 722 of the report it would appear that personal jurisdiction over the bank was obtained and that the attachments were incidental, and hence a judgment *in personam* could be entered, although the attachments were vacated. In the case at bar, personal jurisdiction over the defendant bank has not been acquired; it has appeared specially, not generally; the proceeding is purely *in rem*, and, upon vacating the attachment, this whole action falls.

While it seems to the defendant in error that, as the bank was apparently solvent and continued to do business for some time after the attachments were levied, the point actually decided in the Mixter case was that no attachment could issue against a solvent bank, yet in any view, the language is certainly explicit and was intended as an authoritative construction of the statute. It is believed that it has been accepted as such in every jurisdiction where the question has arisen since.

In *Bank of Montreal* vs. *Fidelity National Bank* (*112 N. Y., 667*) the order of the Court below vacating an attachment was affirmed "on the authority of Pacific National Bank *vs.* Mixter (124 U. S., 721)." No opinion was rendered, but all the Judges concurred. The opinion below in this case (49 Hun, 607; reported in full 17 N. Y. State Reporter, 88), shows that the defendant bank was treated as solvent, and the decision was made in pursuance of the judgment of this Court in the Mixter case. So, also, it appears in Judge Vann's opinion, in the case at bar, that Judge Gray, who was a member of the Court of Appeals when it made that decision, recalled that it was the intention of the Court to yield its previous views to those expressed by the Supreme Court of the United States on this subject (p. 23).

In Massachusetts an injunction against a solvent national bank was denied, on the authority of the Mixter case, Mr. Justice Holmes writing a well-considered opinion.

Freeman Mfg. Co. vs. *Nat. Bank of Republic, 160 Mass., 398.*

In Vermont the courts have held that national banks were not subject to attachment or injunction before final judgment.

Safford vs. *Nat. Bank of Plattsburgh, 61 Vt., 373.*

Hazen vs. *Lyndonville Nat. Bank, 70 Vt., 543.*

In Minnesota it has been held that an attachment against a national bank in another State was void, and as it could not confer jurisdiction the issuance of an injunction to restrain prosecution would be an idle ceremony.

First Nat. Bank vs. *La Due, 39 Minn., 415.*

In Tennessee the courts recognized the controlling authority of the Supreme Court in the interpretation of the Federal statute and sustained a plea that attachment against a national bank gave the Court no jurisdiction.

Rosenheim R. E. Co. vs. *Southern Nat. Bank, 46 S. W. Reporter, 1026 (Ch. App. Tenn.).*

In *Planters' Loan, &c., Bank*, vs. *Berry, 91 Ga., 264*, Blackley, *C. J.*, declared that bonds given to discharge an attachment against a solvent national bank were void, and fully accepted the doctrine of the Mixter case as a sound interpretation of the statute.

In *Dennis* vs. *First Nat. Bank of Seattle, 127 Cal., 453*, an attachment against a solvent national bank was dissolved as prohibited by the statute.

In *Garner* vs. *Second Nat. Bank, 66 Fed. Rep., 869*, Judge Lacombe set aside an attachment issued against a solvent national bank, on the authority of the Mixter case.

The decision in the Mixter case was not questioned, even indirectly, in the cases of *Earle* vs. *Pennsylvania, 178 U. S., 449*, and *Earle* vs. *Conway, 178 U. S., 456*, as stated by the plaintiff in error (p. 19 of Brief). The point was clearly not involved in those cases, and the Court so stated.

It is submitted that the decision of the Supreme Court of the United States, supported by the foregoing cases, has established the universally recognized principle that in no case can an attachment issue against a national bank, and, except for strong

reasons of public policy, a contrary doctrine should not now be introduced. It is needless to attempt to add any argument to the reasons contained in the opinions of the learned and eminent Judges in the cases cited, but the defendant in error calls the attention of the Court to the far-reaching importance of the principle involved in this case. The amount here concerned is trivial, but the decision will affect every national bank in the country outside of New York, for almost without exception every such bank keeps funds in the hands of its New York correspondent to meet its obligations there, and the security of these funds is of great value to the banking and commercial interests of the country.

Second.

The Act of Congress of July 12, 1882, Section 4 neither repealed the clause of Section 5242 in question nor gave any new or different right to creditors of national banks in regard to provisional remedies.

The act is as follows (22 U. S. Stat. at Large, 162):

" That any association so extending the period of
" its succession shall continue to enjoy all the rights
" and privileges and immunities granted, and shall
" continue to be subject to all the duties, liabilities
" and restrictions imposed by the Revised Statutes
" of the United States and other acts having ref-
" erence to national banking associations, and it
" shall continue to be in all respects the identical
" association it was before the extension of its
" period of succession. *Provided, however*, that the
" jurisdiction for suits hereafter brought by or
" against any association established under any
" law providing for national banking associations,
" except suits between them and the United States,

" or its officers and agents, shall be the same as, " and not other than, the jurisdiction for suits by " or against banks not organized under any law of " the United States, which do or might do banking " business where such national banking associations " may be doing business when such suits may be " begun. And all laws and parts of laws of the " United States inconsistent with this proviso be, " and the same are hereby, repealed."

This statute and similar legislation were considered in *Petri* vs. *Commercial Bank, 142 U. S., 644,* and *Continental National Bank* vs. *Buford, 191 U. S., 119.* By the first National Bank Acts, Circuit Courts of the United States had jurisdiction of suits by or against national banks because of their Federal origin as well as because of diverse citizenship. By the Act of 1882, Chapter 290, the jurisdiction arising from the Federal origin of national banks was taken away, but the jurisdiction arising from diverse citizenship remained, and the Acts of 1887, March 3, and of 1888, August 13, had the same purpose and effect, and no more.

" The necessary effect of this legislation was to " make national banks, for purposes of suing and " being sued in the Circuit Courts of the United " States, citizens of the States in which they were " respectively located, and to withdraw from them " the right to invoke the jurisdiction of the Circuit " Courts of the United States simply upon the " ground that they were created by and exer- " cised their powers under Acts of Congress.

" *No other purpose can be imputed to Congress* " *than to effect that result* " (by Mr. Justice Harlan, in *Continental National Bank* vs. *Buford, 191 U. S., 119, 123*).

Attachments, such as in the case at bar, give no jurisdiction over the person of any defendant but merely over the property levied on within the juris-

diction of the Court issuing the attachment, and a judgment entered in the suit affects only such property and not the person of the defendant or his general property (*Pennoyer* vs. *Neff*, *95 U. S., 714*).

The subject of jurisdiction is not involved in the case at bar, but merely the incident of provisional remedy and procedure. The statutes above referred to have therefore no application.

The claim made here by the plaintiff in error has been considered in several cases and the effect of the Act of 1882 is well stated by the learned Justice who wrote the opinion at the Appellate Division (p. 12):

" This statute is not inconsistent with the clause " of Section 5242 prohibiting the issue of warrants " of attachment, injunction and executions against " national banks by the State courts before judg- " ment. The Act of 1882 was intended to prescribe " the forum for litigations by and against national " banks, and does not relate to the provisional " remedy to be had in such actions. It was de- " signed to prescribe the place where, and the " courts in which, such actions may be prosecuted; " but it was not intended to regulate procedure in " such actions when brought."

After quoting this passage Judge Vann said (p. 24):

" Nor, we might add, was it intended to so regu- " late the method of commencing an action as to " enable a State court to acquire jurisdiction over " the property of a national bank without acquiring " jurisdiction of the bank itself."

See also

Raynor vs. *Pacific Nat. Bank*, *94 N. Y., 471.*

Freeman Mfg. Co. vs. *Nat. Bank of Republic*, *160 Mass., 398.*

Pacific Nat. Bank vs. *Mixter*, *124 U. S., 721.*

It is submitted that this construction is a sound interpretation of the statute and should be followed in this case.

Third.

The judgment of the Court of Appeals of the State of New York should be affirmed.

April 12, 1905.

PERCY S. DUDLEY,
Of Counsel for Defendant in Error.